

(d) To demonstrate a lack of vertical market power, a Seller that owns, operates or controls transmission facilities, or whose affiliates own, operate or control transmission facilities, must have on file with the Commission an Open Access Transmission Tariff, as described in § 35.28; provided, however, that a Seller whose foreign affiliate(s) own, operate or control transmission facilities outside of the United States that can be used by competitors of the Seller to reach United States markets must demonstrate that such affiliate either has adopted and is implementing an Open Access Transmission Tariff as described in § 35.28, or otherwise offers comparable, non-discriminatory access to such transmission facilities.

(e) To demonstrate a lack of vertical market power in wholesale energy markets through the affiliation, ownership or control of inputs to electric power production, such as the transportation or distribution of the inputs to electric power production, a Seller must provide the following information:

(1) A description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, intrastate natural gas storage or distribution facilities;

(2) Sites for generation capacity development; and

(3) Physical coal supply sources and ownership or control over who may access transportation of coal supplies.

(4) A Seller must ensure that this information is included in the record of each new application for market-based rates and each updated market power analysis. In addition, a Seller is required to make an affirmative statement that it has not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.

(f) If the seller seeks to protect any portion of the application, or any attachment thereto, from public disclosure pursuant to § 388.112 of this chapter, the seller must include with its request for privileged treatment a proposed protective order under which the parties to the proceeding will be able to review any of the data, information, analysis or other documentation relied upon by the seller for which privileged

treatment is sought. A seller must grant access to privileged data to any party that signs a protective order within 5 days from the date that the party executes the protective order.

[Order 697, 72 FR 40038, July 20, 2007, as amended by Order 697-B, 73 FR 79627, Dec. 30, 2008]

§ 35.38 Mitigation.

(a) A Seller that has been found to have market power in generation or that is presumed to have horizontal market power by virtue of failing or foregoing the horizontal market power screens, as described in § 35.37(c), may adopt the default mitigation detailed in paragraph (b) of this section or may propose mitigation tailored to its own particular circumstances to eliminate its ability to exercise market power. Mitigation will apply only to the market(s) in which the Seller is found, or presumed, to have market power.

(b) Default mitigation consists of three distinct products:

(1) Sales of power of one week or less priced at the Seller's incremental cost plus a 10 percent adder;

(2) Sales of power of more than one week but less than one year priced at no higher than a cost-based ceiling reflecting the costs of the unit(s) expected to provide the service; and

(3) New contracts filed for review under section 205 of the Federal Power Act for sales of power for one year or more priced at a rate not to exceed embedded cost of service.

§ 35.39 Affiliate restrictions.

(a) *General affiliate provisions.* As a condition of obtaining and retaining market-based rate authority, the conditions provided in this section, including the restriction on affiliate sales of electric energy and all other affiliate provisions, must be satisfied on an ongoing basis, unless otherwise authorized by Commission rule or order. Failure to satisfy these conditions will constitute a violation of the Seller's market-based rate tariff.

(b) *Restriction on affiliate sales of electric energy or capacity.* As a condition of obtaining and retaining market-based rate authority, no wholesale sale of electric energy or capacity may be